IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-510

UNITED STATES OF AMERICA,
Petitioner,

vs.

STATE OF NEW MEXICO,
Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW MEXICO

BRIEF OF AMICUS CURIAE SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS

Amicus Curiae Salt River Project Agricultural Improvement and Power District (hereinafter "the District") is a municipal corporation and political subdivision of the State of Arizona organized pursuant to Ariz. Rev. Stat. Anno. §§ 45-901 *et seq.* (1956 and 1977 Supp.). By virtue of various contracts, the District and

the Salt River Valley Water Users' Association operate the Salt River Project, a federal reclamation project authorized and constructed under authority of the Reclamation Act of 1902, 43 U.S.C. § 371 *et seq*. The Salt River Project facilities impound the waters of the Salt and Verde Rivers for storage and delivery to municipal, industrial, and agricultural water users downstream in the Salt River Valley in central Arizona (in the Phoenix area). Over half the population of Arizona resides in the Salt River Valley.

Some 58% of the Salt and Verde River watersheds has been reserved as national forest land, in part for the protection of the water supply of the Salt River Project. The entire flow of the Salt and Verde Rivers is appropriated to specific lands, lying mostly in the Salt River Valley, and the rights of individual landowners to beneficially use the waters on lands within the Salt River Project were confirmed or provided for in a decree of the Arizona Territorial Court on March 1, 1910. The District and the Association are responsible for administration of the rights to Salt and Verde River waters as provided for in the court decree.

Under the court-created federal reserved water rights doctrine as it is presently articulated, the United States may at any time expand its water consumption in pursuance of the original purposes of a federal reservation, up to the limit of all waters unappropriated at the time the reservation was made. It is said that the rights of actual downstream appropriators are junior in entitlement, even though superior in time of actual use, to the prerogatives of the United States. Thus, the Government claims (though the

Court has never been presented with such a case[1]) that it may defeat the rights of downstream water users which are senior in time without any obligation of compensation.

In this case the Government claims it has a reserved right to all the water it may ever wish to beneficially use in the future in national forests for recreation, stock watering, and maintenance of minimum stream flows. Application of the Government's claims to the national forests on the Salt and Verde River watersheds would work a gallon-for-gallon expropriation of downstream users whose rights are prior in time to the United States.

The significance of this case is that by grounding its claim to water for recreation, fish and wildlife habitat, and livestock uses in the reserved rights doctrine, the United States claims not the right to preserve such uses but rather the right to commence such uses where they were not previously made, notwithstanding the present or future unavailability of water for such activities. For example, for 70 years the flow of the Salt and Verde Rivers below the reservoirs has been managed solely according to municipal, industrial and reclama-

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[1] The only reserved rights cases this Court has decided on the merits involved claims to unappropriated water or water to which the United States (or its Indian beneficiaries) had a priority of actual beneficial usage. In *Winters v. United States*, 207 U.S. 564 (1908) upstream non-Indian diverters had interfered with prior Indian uses. In *Arizona v. California*, 373 U.S. 546 (1963) the Court adjudicated reserved rights to water to which appropriative rights had not attached. In *Cappaert v. United States*, 426 U.S. 128 (1976) the United States had put the reserved waters to actual use long before the Cappaerts sought to appropriate them.

tion water needs. This results in no water releases in some months, and fish populations are lost. If fish uses are an original "reserved purpose" of national forests, the fish purpose might be superior to the property rights of individual appropriators, and the United States might demand the perennial release of water to maintain sport fishing.[2] Similarly, recreational use of water impounded by Salt River Project dams has never been allowed to prevail over urban and agricultural needs. Recreational uses of water below the reservoirs have been limited, and recreational impoundments above the major reservoirs have been resisted where they would reduce runoff. These historic priorities would be reversed under the Government's submissions in this case.

A specific problem in recent years in the Salt River Project has been a decline in runoff due to increased construction of stock watering ponds in the upper watershed. The Government's claims in this case would allow upstream cattlemen grazing under national forest permits to lawfully impound waters to whatever extent they are physically able to do so. The vested property rights of downstream appropriators would be transferred without compensation to upstream cattlemen because of the fortuity that they graze their cattle on national forest lands.

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[2] If year-round fish habitat on the Salt River were maintained by releasing 100 cubic feet per second during the five months the river is otherwise dry, the annual cost would be $86,000 in lost hydrogenerating capacity and $1,691,796 in lost water, appraised at a replacement value of $56.50 per acre foot.

This Court's federal reserved water rights doctrine runs at cross-purposes to the prior appropriation principles upon which the Congress encouraged the settlement and development of the semi-arid West.[3] Therefore, this Court must proceed with extreme caution in applying its doctrine in order to avoid disastrous disruption of complex water law regimes as well as unconscionable frustration of long-established property expectations. This Amicus believes that the Government's contentions in this case vividly illustrate the limitless (and oppressive) conclusions which the uncritical can extract from the simple verbal formulas of the reserved rights doctrine. Thus, in this case the Court must decide whether it will use the reserved rights doctrine with care and precision or whether it will allow sprawling syllogisms to blot out a hundred years of prior appropriation water law and property entitlements. The interest of this Amicus and of the water users it serves is in the affirmance of the decision of the New Mexico Supreme Court and in a cautious and restricted use of the federal reserved water rights doctrine.

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[3] Priority of actual beneficial usage is made the measure of water rights in all the significant Nineteenth Century federal legislation on water rights. *E.g.* Act of July 26, 1866, ch. 262, 14 Stat. 251; Act of July 9, 1870, ch. 235, 16 Stat. 217; Act of March 3, 1877, ch. 107 §1, 19 Stat. 377, 43 U.S.C. §321 (Desert Lands Act); Act of June 17, 1902, ch. 1093, 32 Stat. 390, 43 U.S.C. §372 (Reclamation Act).

ARGUMENT

I. PREFACE

This Amicus will be greatly damaged by a rule that national forests have reserved water rights for recreation, instream flows for fish, or stockwatering—not so much because we object to continuation of existing uses for those purposes but because there is no unappropriated water left in our watershed to support expansion of those purposes. Recognition of reserved rights for those purposes would be especially pernicious because water can be consumed without limit in furtherance of recreation and in very great quantities for fish and stockwatering.

In our brief we will discuss the stockwatering question in order to bring to the Court's attention the serious consequences of stockwatering for downstream water users. We submit that the discrete question of reserved rights for stockwatering illustrates the serious problems this Court creates by interposing federal common law rules into complex regimes of state property law. This specific illustration should counsel great caution in the application of the reserved rights doctrine.

II. THE EFFECTS OF STOCKWATERING ON DOWNSTREAM WATER RIGHTS

The prevalent method of stockwatering in range areas lacking perennial streams and springs is to construct small earthen reservoirs across natural water courses. These reservoirs (called stock ponds or stock tanks in the West) are made by digging out holes or by raising enbankments in the path of the runoff, which collects in the pond and is available to livestock until

it is lost through evaporation and seepage. With the advent of earth moving equipment, stock tanks have proliferated in many parts of the West.

Stock tanks are a very inefficient means of watering livestock. A study of a 1027 square mile watershed in southern Arizona showed that only 1.2% of the consumptive water use of stock tanks was consumed by livestock. Some 98.8% of the loss was to evaporation and seepage.[4]

Studies over the last thirty years have shown that stock tanks significantly reduce the runoff to downstream water users. In the study referred to above, it was concluded that 167 stock tanks reduced runoff by 15%. In a study conducted on a 49 square mile watershed in the Verde River basin in Arizona it was concluded that 27 stock tanks intercepting the flow from 32% of the watershed reduced total runoff by an average of 6.3%.[5] In seven other studies conducted between 1961 and 1973, streamflow reduction varied between 0% and 44% with an average of 18%. The

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[4] C. Brent Cluff, "Multipurpose Water Harvesting Systems — A Possible Method of Augmenting Streamflow Through Reduction of Inefficient Earth Stock Tanks in Stream Channels on Semiarid Waterhsheds," Proceedings of National Symposium on Watershed Transitions, pp. 251-256 (June 19-21, 1972, Fort Collins, Colo.)

[5] Collis Joe Lovely, "Hydrologic Modeling to Determine the Effect of Small Earthen Reservoirs on Ephemeral Streamflow," pp. 34-37 (1976: unpublished master's thesis, University of Arizona, Dept. of Hydrology and Water Resources).

average percentage of watershed above the stock tanks in these studies was 51.3%.[6]

The most authoritative study was one conducted between 1951 and 1954 of the 9,100 square mile watershed of the Cheyenne River basin above Angostura Dam. The estimated average annual reduction in runoff caused by stock tanks was 32%.[7]

All the studies conclude that stock tanks have their greatest proportionate effect in times of water scarcity since they take a first call on available runoff. This factor is probably more important than the average reduction in runoff because the loss of water to stock tanks will cause the downstream users greatest injury when they have greatest need for water.

The expansion of stockwatering to the detriment of vested water rights has led the Arizona legislature to outlaw the construction of new stock tanks without prior state approval after notice to all affected persons. Ariz. Rev. Stat. Anno. § 45-401 *et. seq.* (1977 Supp.)

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[6] *Id.*, p. 9.

[7] R. C. Culler, "Hydrology of Stock-Water Reservoirs in Upper Cheyenne River Basin," pp. 132-134. U.S. Geological Survey Water Supply Paper 1531-A (1961 U.S. Dept. of the Interior).

III. RECOGNITION OF A RESERVED RIGHT TO STOCKWATERING IS LARGELY UNNECESSARY TO PROTECT EXISTING USES AND WOULD ALLOW FEDERAL ADMINISTRATORS AND PRIVATE CATTLE INTERESTS TO CONFISCATE PRIVATE WATER RIGHTS IN THE FUTURE.

Stock grazing in national forests is an historic and beneficial use of our public lands, and water is essential for that use. Affirmance of the New Mexico Supreme Court decision will probably not affect present stock grazing,[8] nor will it prevent increased grazing with presently unappropriated waters. But the Government is not here asking for protection of present uses or future uses of unappropriated water. By grounding its claim in the reserved rights doctrine, the government is asking for a license to *increase* stock tank development whenever it chooses to do so in the future, to whatever extent it likes. The water necessary for future expansion is to be taken from private appropriators without the inconvenience of condemnation proceedings.

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[8] Under prior appropriation principles, existing forest stock watering rights may be vulnerable if they are junior in time to downstream rights and there is insufficient water for both. That is unlikely since the mere fact stockwatering uses are currently made suggests either that they have adequate seniority of usage or that injured downstream users have not brought suit and their rights have been or will be extinguished by limitations.

The direct beneficiaries of a reserved right to stock watering will be the cattlemen who graze in national forests. The United States will benefit only indirectly in that it will be able to sell to private ranching interests the privilege of diverting with impunity other people's water. We submit that this result is unconscionable. Yet the result follows inexorably from recognition of a federal reserved right for stockwatering.

The only consideration the Government offers in support of its proposal is administrative convenience. Petitioner's Brief, pp. 57-63. The Government argues that if the stock watering rights are held by the permittees rather than the United States, the rights will have to be transferred under state law procedures whenever the permittees are changed. It would be more convenient for the Governent to own the rights directly and thus be able to change permittees without making filings with the state water agencies.

Assuming this problem is real, it falls far short of justifying an open-end federal prerogative to expand stockwatering consumption in the future. The problem is essentially one of who owns the present stockwatering rights, not one of the source of the right. The problem would be fully solved by holding that the United States owns appropriative rights by virtue of the actual beneficial use of its licensees. The Government would then not have to process each change in permittee through the state water agencies though it would have to perfect increased usage under state law. In contrast, the Government's proposed solution to its

problem is not nearly so humble as the problem itself. To avoid paperwork over who owns what, the Government would have this Court hold that the Government owns as much as it wants.

In any event, there is no reason for this Court to conclude that there is a substantial paperwork problem caused by recognition that grazing permittees rather than the United States own stockwatering rights in national forests. If there is a problem, it can be better solved by Congress than by judicial adoption of sweeping principles of federal property law. If the forest service is truly hampered by state water law procedural requirements, the Congress can free the administration of water rights on national forests acquired under state law from such procedural requirements without at the same time revoking the substantive rights of other persons.

As applied to stockwatering in national forests, the federal reserved water rights doctrine serves no substantial purpose. Rather, it would allow federal officials to give the vested water rights of private persons to cattlemen who graze their stock in national forests. Any interests in preserving existing stock watering uses are substantially if not completely met under prior appropriation principles. Federal bureaucratic desires to avoid state-imposed paperwork should not justify mass confiscation of private water rights.

CONCLUSION

While the reserved rights doctrine necessarily frustrates prior appropriation objectives, the extent of that frustration will depend on the amount of water which reservation purposes may call upon. Thus, a reservation use which is modest and predictable in amount will be less harsh to private users and will create less uncertainty about water entitlements than will a reservation use which is highly consumptive or which is uncertain in extent. The only specific standards of quantification which this Court has recognized in federal reserved water rights cases have been limited and definable in amount.[9] In this case the Government makes modest claims on the Mimbres River,[10] but the principle it advances is not limited to modest claims. The proposed reservation purposes would support highly elastic standards of consumption. Recreational consumption of water is potentially unlimited. The expansiveness of the possible levels of consumption should be enough to discourage the extension of reserved rights doctrine to such uses.

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[9] In *Arizona v. California, supra,* the Court acknowledged a right of some Indian reservations to the water necessary to irrigate all of the irrigable land within the reservation. In *Cappaert v. United States, supra,* the Court recognized a reserved right to maintain a minimal level of groundwater for a subterranean fish habitat.

[10] Other national forest managers have not been so bashful with the reserved rights doctrine. Managers of the Coconino National Forest in Arizona have claimed reserved rights for future water uses 57 times greater than established consumption. (Letter of November 21, 1972 filed with Arizona Land Department, Water Rights Division)

The Government submits that creation of reserved rights to water is necessary for the preservation of recreational and wildlife uses in national forests, but the factual predicate of the argument is highly improbable. In fact, recognition by this Court of federal property rights for recreation, fish, and livestock watering in national forests will not necessarily promote those objectives but rather will allow federal land administrators to determine whether water shall be used for recreation, fish purposes, or stockwatering. This is because stockwatering uses of intermittent streams are starkly inconsistent with maintenance of those streams for recreational and fish uses. If intermittent water courses are dammed up for stockwatering, it is far less likely that runoff will be available for hiking and camping uses or for fish.

The problems discussed by the Government are far more complex than the Government allows, and those problems will be vastly complicated rather than solved by sweeping judicial creations and destructions of property rights.

The judgment of the New Mexico Supreme Court should be affirmed.

Respectfully submitted,

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April 1978

CERTIFICATE OF SERVICE

I, Neil Vincent Wake, one of the attorneys for Amicus Curiae and a member of the bar of this Court, certify that all parties required to be served have been served with the foregoing Brief; specifically, that on March 31, 1978 I caused to be deposited in a United States Post Office at Phoenix, Arizona, with air mail postage prepaid, three (3) copies of the foregoing Brief of Amicus Curiae addressed to each of the following:

The Hon. Wade McCree, Jr.
Solicitor General
Department of Justice
Washington, D.C. 20530

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